APPENDIX.

In the
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit,

October Term and Session, 1942.

No. 8028.

National Labor Relations Board, Petitioner,

vs.

Aintree Corporation, Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

November 12, 1942.

Before Evans, Major and Kerner, Circuit Judges.

* * * * * * *

Major, C. J., Dissenting:

I am aware of the futility of taking issue with the Labor Board, but my study of the record leaves no alternative. Notwithstanding the fact that we are bound by findings of the Board, if substantially supported, I am unable to reconcile myself to the theory that we are merely a "rubber stamp." If so, the "right of review" is without potency and becomes an idle and useless ceremony.

The unfavorable background, so heavily stressed by the Supreme Court in cases such as *International Association of Machinists, Tool and Die Makers v. National Labor Relations Board,* 311 U. S. 72, and *National Labor Relations Board v. Link-Belt Company,* 311 U. S. 584, places the instant case in a different category. This background, however, has been completely ignored by the Board. There is not a scintilla of evidence of any anti-union history,—that respondent has ever fostered company unions, broken

strikes, been guilty of espionage or of any character of hostility against or favoritism toward any union or member thereof. When this background is considered, the few picked and garbled statements relied upon by the Board are insignificant. As said by the Supreme Court in the Link-Belt case, on page 599:

"If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere."

In the instant case, the record discloses conclusively, in my judgment, that the statements relied upon did not restrain the employees, and, furthermore, that the management was not responsible for such statements.

Most of the statements relied upon are chargeable to Baker, who was respondent's production manager. In July of 1940, one Leary was installed as respondent's plant manager. At that time, respondent was in a precarious condition financially. Leary called a meeting of the employees and informed them that production would have to be increased or the company would be compelled to close its plant. He told them that he was in sole charge and that no one other than he would have authority to hire, fire or lay off employees, and that all orders would be issued by him. It was subsequent to this that an organizer appeared on the scene, for the purpose of organizing the International.

The two main witnesses relied upon by the Board to show restraint or coercion are Potts and Manlove. The former testified that she "certainly" understood that Baker was merely expressing his own opinion and not the view of the company. Potts, who was an officer of the International, continued as such and was actually promoted to a better paying position. Manlove also testified that she understood Baker was merely expressing his own opinion. She became a member of the International, and shortly afterwards was also promoted to a better paying position. Neither Potts nor Manlove reported the statements relied upon to any of

their fellow employees, to the International organizer or to the management. There is not the slightest ground for the inference that these two employees were coerced or interfered with, and certainly statements made to them and unreported could not have influenced any other employee.

The statement attributed to Baker on the night of December 27, and the circumstances surrounding the same, are stressed. On that evening four members of the International were stationed in an automobile which was parked in front of the City Hall where The Better Union was holding its meeting. Baker was passing by on the sidewalk and was called over to the car, and the occupants commenced a conversation with him. They asked him if he was going to the meeting and if he would take them with him. According to their own version, he chatted with them for half an hour in casual conversation. Baker told them that he did not want to engage in conversation concerning the union. The Board's testimony disclosed that the whole conversation was initiated by the occupants of the car, and that Baker was merely answering their questions. It was in response to such questions that Baker said the factory could move out of town but it wouldn't be because of union activities. This incident is illustrative of the friendly and sociable relation which existed between Baker and the employees. Whether on the street or in the factory, he chatted and visited with the employees in a most friendly and informal fashion.

If, however, any unfavorable inference could be drawn from Baker's statements of December 27 standing alone, such inference was totally dispelled by an occurrence of December 10. On this occasion, Flamberg, respondent's president, who resided in New York City, and Leary met in conference with Ellinger, the International organizer, and with the officers of the International local. It is not claimed that International, at that time or any other, represented a majority of respondent's employees. In that conference, Flamberg told the officials of the International local that respondent would recognize and bargain with their union if it was selected by a majority of the employees, that he had no choice in the matter at all, and "that he was not fighting unions." According to the

Board's witnesses, Flamberg made it plain that no discrimination would be tolerated against any employees on account of union membership, and requested them to report to Leary anything which they might feel was a discrimination against any member of the union. At the request of International's organizer, Flamberg authorized the union to quote him as to respondent's position in this respect. As a result, circulars were published and distributed by International officials to all of respondent's employees. The statement advised the employees, among other things, as follows:

"Mr. Irving Flamberg, with permission to publish, declared he was willing to deal with the Union whenever a majority was reached and pledged that no worker would be discriminated against for union membership."

Thus, when the statements made by Baker are considered in connection with respondent's background, the unequivocal testimony of the persons to whom the statements were made that they knew such statements merely represented Baker's opinion and in further connection with respondent's attitude as expressed by Flamberg, made known to all of respondent's employees, there is not the slightest basis for a finding that such statements were coercive, or that they represented respondent's attitude. As was said in *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 479:

"It is clear that the Board specifically found that those utterances were unfair labor practices, and it does not appear that the Board raised them to the stature of coercion by reliance on the surrounding circumstances. If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone."

The Board's decision dwells at length upon an article published in the Wayne County Press of Fairfield, January 2, 1941, entitled "Combating Union at Campe Factory Here." After elaborating the details of this article, the statement appears in a footnote: "We do not find that

responsibility for the publication of this newspaper article referred to above is chargeable to respondent." It is plain that respondent had nothing to do with the publication of the article, and in fact repudiated it at the first opportunity. The question naturally arises as to why such admittedly incompetent evidence was offered, much less relied upon by the Board in its decision and in its brief in this Court.

The Better Union, an unaffiliated organization, was permitted to intervene before the Labor Board and also in this Court. In its brief, it is stated: "The primary purpose of the charges and the complaint was to destroy an independent union formed by a large majority of the workers, known as The Better Union." In my judgment, this assertion is justified by the record. There is not a scintilla of evidence that respondent in any way, shape or form assisted this Union, financially or otherwise. The circumstances relied upon by the Board are frivolous and so speculative as to carry little, if any, weight.

The Better Union had its inception at a Christmas party, held at the home of one of the employees on December 19, 1940. During such party, a discussion was had concerning the International. Most of those present were opposed, largely on account of the threats made by the International organizer. At any rate, one of those present, by the name of Anthis, was instructed to consult an attorney, which was done. The attorney prepared the constitution and by-laws and appeared at a meeting of those desiring to join The Better Union. The attorney explained their rights under the Act and that they were free to join either the International or The Better Union. The only asserted connection between the organization of The Better Union and respondent is furnished by the testimony of one Kittel, secretary of the International. According to his testimony, Anthis was frequently seen in Leary's office under friendly, and what Kittel thought were suspicious, circumstances. On his testimony, the Board found that "Anthis was accorded unusual freedom by the respondent during the period of time in which he was actively engaged in organizing T. B. U." There is no proof as to what was said either by Leary or Anthis, or that the visits had any-

thing to do with the organization of The Better Union. Upon the Board's finding of "unusual freedom", it jumps to the far-fetched conclusion that it had to do with the formation of The Better Union.

The Board in its brief states that certain employees, including "Perry Musgrave, foreman of respondent's cutting room, discussed ways and means of stopping the Union." This was supposed to have happened at the party on December 19 heretofore mentioned. It is true that Musgrave was present at this party, but I am unable to find a word of testimony that he participated in the discussion. The fact is that one of the Board's own witnesses testified that he was not in the room when such discussion took place.

Another circumstance relied upon is that some of the supervisory employees attended meetings of The Better Union. It should be noted that they also attended meetings of the International. The fact further is they were invited to attend the meetings of both Unions, and at both they heard speakers fairly advise those present of their rights, and that they must choose for themselves which Union they preferred. These supervisory employees took no part in the discussion at the meetings they attended, either of The Better Union or of the International. The Board concedes in its brief, as it must, that the supervisory employees had a right to attend the union meetings and to join if they desired, but it is claimed that their presence at the meetings of The Better Union had a prejudicial effect. How this speculative conjecture was reached is not disclosed. There is no dispute but that such supervisors had been warned to be neutral as between the two Unions, and there is no proof that they rendered any form of assistance to either. Moreover, what was respondent to do? If it had discharged such supervisory employees for attending or joining either of these Unions, it no doubt would have been charged with discrimination. Such was the predicament of the employer in *National Labor Relations Board v. Luxuray, Inc.*, 123 Fed. (2d) 106, 108.

On January 3, 1941, The Better Union, through its attorney, made formal demand to be recognized as the bargaining agent for respondent's employees. At that time, it had a membership of 180, out of a total of about 250

employees. At the hearing before the Trial Examiner, it was stipulated that 180 employees would testify, if called, that they were members of The Better Union.

Thus the record, to me, conclusively demonstrates that there was no domination or interference with the organization of The Better Union. It was the free and voluntary act of the employees themselves. It was the exercise of a right guaranteed by the Act. For the protection of this right, 180 of such employees knocked at the door of the Labor Board in vain. To hold, as has been done under the flimsy pretexts advanced, that they were intimidated or coerced, is to disparage their intelligence. It is such decisions as this which are calculated to bring the National Labor Relations Act into disrepute. As a final climax to this arbitrary decree, respondent, among other things, is directed to post notices immediately, "that the respondent's employees are free to become or remain members of International Ladies' Garment Workers' Union, Local No. 373, affiliated with the American Federation of Labor, and that the respondent will not discriminate against any employee because of membership or activity in that organization."

I think the Board's petition for enforcement should be Denied.